SING HONG (KODIANG) SDN. BHD.

v.

PEMBINAAN NG SHENG KWEE SDN. BHD. & ORS. AS INTERVENERS

HIGH COURT MALAYA, ALOR SETAR
LIM BENG CHOON J
[CIVIL SUIT NO. 24-55-87]
31 OCTOBER 1987

CIVIL PROCEDURE: *Application to set aside judgment in default obtained regularly - Whether there were merits in the defence - Whether defence discloses an arguable and triable issue - There must be an affidavit of merits stating facts which can satisfy Court that defendant has a reasonable defence on merits - Meaning of "defence on merits" or "to be an arguable issue" or "a defence which discloses an arguable and triable issue".*

The applicant company (defendant) applied to set aside the judgment in default of appearance obtained by the respondent company (plaintiff) and for leave to defend the action instituted by the respondent company against them for a claim of a sum of RM44,298.09 being the balance monies for goods sold and delivered and transport charges connected therewith.

The applicant company alleged that the respondent company had fraudulently overcharged the volumes of granite aggregates delivered to their worksite. The basis of the contention is the fact the lorries used to transport the granite aggregates could not exceed a certain permissible tonnage as specified in the respective carrier permits or licence issued by the Road Transport Department for the transportation of goods by lorries. Therefore they were of the view that since the weights of the consignments exceeded the permissible tonnage, it must therefore follow that the weights of the said consignments as stated in the 3 documents were false and that the respondent company had fraudulently overcharged the applicant company.

Held:

[1] Order 13 r. 8 of the Rule of the High Court 1980 gives an unfettered discretion to the Court to set aside a judgment entered in default of appearance. However, the Courts discretion under that rule must be exercised in accordance with the settled principle that if the judgment is a regular judgment (as in the instant case), then it is an almost inflexible rule that there must be an affidavit of merits stating facts which can satisfy the Court that the defendant has a reasonable defence on the merits.

[2] In this case, the applicant company had failed to show that they have a good defence upon the merits or that they have disclosed such facts as may be deemed sufficient to entitle them to put up a defence. The applicant company had raised no triable issue which could amount to a defence to the action.

[3] Therefore the application to set aside the judgment in default is dismissed with costs.

[Application dismissed with costs.]

Cases referred to:
Bank Bumiputra Bhd. v. Majlis Amanah Rakyat [1979] 1 MLJ 23
Tong Lee Hua v. Yong Koh Chin [1981] 2 MLJ 1
Burns v. Kondel [1971] 1 Lloyd's LR 554
Wallingford v. Mutual Society [1880] 5 App Cas 685
Re Young Manufacturing Co.[1900] 2 Ch 753

Legislation referred to:
Rules of the High Court 1980, O. 13, rr. 1, 8

For the plaintiff - R.C. Murugeson; M/s. R.C. Murugeson
For the defendant - A Mahendran; M/s. Mahendran & Co.
For the interveners - Manjit Singh Sachdev; M/s. Manjit Singh Sachdev & Co.

JUDGMENT

Lim Beng Choon J:

In this ruling I propose to allude only to the salient facts as adduced from the affidavit evidence although I must mention that I have taken into consideration all the relevant matters and the circumstances of the case in making my ruling. I do not propose to touch on the other interlocutory proceedings relating to the issue of an interlocutory injunction and the variation of the injunction. However that may be, should there be an appeal against my ruling, I shall elaborate in detail all the relevant facts and matters in my written judgment.

This is an application made by the defendant (referred to as 'the applicant company') by way of summons-in-chambers dated 15 August 1987 (encl. 32) to set aside the judgment in default of appearance and for leave to defend the action instituted by the plaintiff (referred to as 'the respondent company') against the applicant company claiming a sum of RM44,298.09 being the balance monies due to them for goods sold and delivered and transport charges connected therewith.

The writ with the statement of claim was served on one of the directors of the applicant company on 13 May 1987. On 2 June 1987 a certificate of non-appearance was issued by the SAR of this Court (encl. 10). In the result, the respondent company entered judgment in default of appearance (encl. 11) on 6 June 1987 pursuant to O. 13 r. 1 of the Rules of the High Court 1980 and by that order the applicant company was ordered to pay a sum of RM45,832.97 comprising of the monies due and payable to the respondent company and the accumulated interest at the rate of 8% p.a. from 24 January 1987 to the date of judgment. A further sum of RM225 was awarded as costs of the proceedings. Hence the present application is made by the applicant company.

No doubt O. 13 r. 8 of the Rules of the High Court 1980 gives an unfettered discretion to the Court to set aside a judgment entered in default of appearance. However, the Court's discretion under that rule must be exercised in accordance with the settled principle that if the judgment is a regular judgment (as it happens in the instant case), then it is an almost

inflexible rule that there must be an affidavit of merits stating facts which can satisfy the Court that the defendant has a reasonable defence on the merits (see *Bank Bumiputra Bhd. v. Majlis Amanah Rakyat* [1979] 1 MLJ 23), and "defence on merits" as explained by Sir John Megaw in *Tong Lee Hua v.Yong Koh Chin* [1981] 2 MLJ 1 means a defence in which there appears to be an arguable issue" or as Lord Denning MR put it in *Burns v. Kondel* [1971] 1 Lloyd's LR 554, explains the phrase to mean "a defence which discloses an arguable and triable issue".

In *Wallingford v. Mutual Society* [1880] 5 App Cas 685, Lord Blackburn explained in greater clarity the materials that a defendant must disclose by affidavit, or otherwise, in order to satisfy that he has a good defence to the action upon the merits or disclose such facts as may be deemed sufficient to entitle him to defend. As the propositions advocated by Lord Blackburn are very pertinent to the determination of the applicant company's application in the instant case, it is profitable to cite the following passages of His Lordship's speech appearing at p. 704:

> Now I think what we have to see here is, what is it that the Judge is to be satisfied of, in order to induce him to refuse to make the order for the plaintiff to sign judgment. If he is satisfied upon the affidavits before him that there really is a defence upon the merits, it is a matter of right, unless there be something very extraordinary (which I can hardly conceive), that the Defendant should be able to raise that defence upon the merits, either to the whole or to a part. He may fall far short of satisfying a Judge that there is a defence upon the merits; still he may do so if he discloses such facts as may be deemed sufficient to entitle him to defend.
>
> And that, my Lords, raises another question altogether. There may very well be facts brought before the Judge which satisfy him that it is reasonable, sometimes without any terms and sometimes with terms, that the defendant should be able to raise this question, and fight it if he pleases, although the Judge is by no means satisfied that it does amount to a defence upon the merits. I think that when the affidavits are brought forward to raise that defence they must, if I may use the expression, condescend upon particulars. It is not enough to swear, "I say I owe the man nothing". Doubtless, if it was true, that you owed the man nothing, as you swear, that would be a good defence. But that is not enough.You must satisfy the Judge that there is reasonable ground for saying so. So again, if you swear that there was fraud, that will not do. It is difficult to define it, but you must give such an extent of definite facts pointing to the fraud as to satisfy the Judge that those are facts which make it reasonable that you should be allowed to raise that defence. And in like manner as to illegality, and every other defence that might be mentioned.
>
> So looking at the affidavits (they are very long and I will not go through them) which were used before Mr. Justice Manistry, I think that in none of those particulars did the appellant satisfy the burden that was cast upon him. He makes general statements of fraud, but nowhere does he condescend upon any particulars of fraud, such as in my mind, if I had been in Mr. Justice Manistry's place, would have made me think that it was at all fit that he should be allowed to defend upon that ground.

> There are long statements resulting in saying that this society was illegal upon various grounds, which I cannot follow at all. One ground, among others, is, because there was a drawing of lots on one occasion, therefore it was illegal as coming under the Lottery Acts. I cannot think that was a good ground of defence.

From the affidavit evidence, the facts leading to the action of which the present application has arisen may be briefly stated as follows. The goods namely the granite aggregates were sold and delivered under an oral agreement made between the applicant company and the respondent company in July 1985 and it was agreed that the granite aggregates were to be delivered to the work site at Tanah Merah, Jitra, Kedah (referred to as the work site,) where the applicant company were carrying out building construction under the Projek Membina dan Menyiapkan Politeknik Alor Star, Kedah for the Kementerian Pelajaran, Malaysia. The supplier of the granite aggregates was Syarikat Bina dan Kuari Kedah Sdn. Bhd. (referred to as "the Syarikat") and the respondent company obtained the supplies of the granite aggregates from the Syarikat. From the affidavit evidence, it is my finding that the arrangement for the delivery of the consignments of the granite aggregates at the work site as approved and adopted by the parties is this. Whenever the applicant company ordered a consignment of granite aggregates, the respondent company would issue a delivery order. Based on the delivery order the Syarikat would load the amount of granite aggregates as per the said order on to a lorry at the quarry of the Syarikat. Before loading the lorry which was to deliver the consignment, the empty lorry would be brought to the platform of a weigh-bridge machine located at the quarry to weight its tare weight. After the lorry was loaded with the granite aggregates, it would be brought once again to the weigh-bridge machine to weigh the gross weight of the laden lorry. The difference between the gross weight and the tare weight would obviously be indicative of the weight of the consignment of the granite aggregates. In the process of weighing the unladen lorry and later the laden lorry the weigh-bridge machine would automatically record the gross and the tare weight of the lorry and the nett weight of the consignment of the granite aggregates and a ticket which the Syarikat described as a weigh-bridge receipt on which was printed the respective weight would be discharged by the said machine. The Syarikat would then prepare a delivery note based on the particulars as set out in the delivery order and the weigh-bridge receipt in respect of the consignment of granite aggregates which was to be delivered by that particular lorry to the work site. It is convenient to mention here that the respondent company has filed an affidavit affirmed by Chang Chuan Eng (referred to as Chong's affidavit) the quarry supervisor of the quarry site of the Syarikat in which the deponent explained the manner of loading and weighing of such consignments of the granite aggregates (encl. 42) which I have adumbrated earlier. The respondent company has also filed another affidavit affirmed on 25 April 1987 by Goh Lay Hock, a director of the respondent company (referred to as Goh's affidavit) and all the delivery orders, delivery notes and weigh-bridge receipts were produced and annexed to Goh's affidavit as Exhibits CCH 1 to CCH 13. The Exhibits reveal that:

(1) Each and every one of the delivery orders issued by the respondent company contained, *inter alia*, the name of the purchaser that is the name of the applicant company, the date of the issue of the said order, the registration number of the lorry that was to transport the consignment of granite aggregates specified therein, the quality and quantity of the granite aggregates expressed in ton, and a blank space for the applicant company or their agent or servant to sign acknowledging receipt of the consignment of granite aggregates.,

(2) Each of the delivery notes issued by the Syarikat contained, *inter alia*, the name of the respondent company, the date and time of the issue of the note, the registration number of the lorry which transported the said consignment, the quality and quantity of the granite aggregates expressed in tons. There was also a blank space for acknowledgement of the receipt of the said consignment to be signed by the applicant company or their agent or servant.

(3) As to the weigh-bridge receipt, it shows *inter alia* the name of the respondent company, the date of the issue of the receipt, the gross weight and the tare weight of the lorry and the nett weight of the consignment of the granite aggregates, the time and date of the issue of the receipt. It also contained the signature of the 'weigh clerk'.

(4) The clerk of the applicant company inscribed his signature on each and every one of the delivery orders and /or delivery notes. There were also many occasions when the clerk of the applicant company also inscribed his signature on the weigh-bridge receipts. In addition the seal of the applicant company was impressed just on top of the said clerk's signature to acknowledge receipt of the consignment of the granite aggregates as specified in the relevant delivery orders, the delivery note and the weigh bridge receipt.

In Chong's affidavit, there were also annexed copies of the monthly statements of account for the months of August 1985 up to August 1986 showing the number of deliveries made each month and the credit or debit balance of the account of the applicant company. The statement of account for each month was sent to the applicant company at the end of that month. A copy of the respondent company's ledger showing the account of the transactions between the parties was also annexed to Chong's affidavit as Exhibit CCH-14. The final entry in CCH-14 shows that the applicant company owed the respondent company a sum of RM44,298.09.

I shall now turn to the materials relied by the applicant company to support their contention that they have a defence upon the merits or that they have disclosed such facts as may be deemed sufficient to entitle them to defend. In support of their application, the applicant company filed an affidavit affirmed by Chin Chon Faa on 15 August 1987 (referred to as Chin's affidavit), the manager of the applicant company. Notwithstanding the rhetorical assertions made in Chin's affidavit, the applicant company's contention is simply that the respondent company had fraudulently overcharged the volumes of granite aggregates delivered to their work site. The basis on which they grounded their contention is simply this. Apparently the applicant company came to know about the permissible tonnage of some of the lorries as specified in their respective carrier permits or licence (referred to as permissible tonnage) issued by the Road Transport Department for the transportation of goods by those lorries. It is the contention of the applicant company that those lorries could not carry any load exceeding their respective permissible weights. In checking the tonnage of the several consignments of the granite aggregates as set out in the pertinent delivery orders, delivery notes and weigh-bridge receipts, the applicant company were of the view that since the weights of those consignments exceeded the permissible tonnage of the lorries which transported the said consignments it must therefore follow that the weights of the said consignments as stated in the 3 documents were false and that the respondent company or

the Syarikat had fraudulently overcharged the applicant company. In support of their contention a hand written record of some 11 pages compiled by an unnamed person was annexed to Chin's affidavit as Exhibit C-1. The contents of Exhibit C-1 show the registration numbers of 6 of the lorries used by the respondent company or the Syarikat to carry out the deliveries of the consignment of the granite aggregates at diverse times and dates mentioned in the Exhibit, the permissible tonnage of the respective lorries, the weights of the granite aggregates expressed in tons delivered by each of the lorries at the relevant times and dates, the volume of overcharged weights and the amount of overpayment made by the applicant company. For example in p. 3 of Exhibit C-1, the entries show that the lorry bearing RA 3310 which was said to have a permissible tonnage of 5.49 tons had carried out three deliveries of granite aggregates on 17 August 1985 the weights of which as stated in the pertinent delivery orders, delivery notes and weigh-bridge receipts were 13.35 tons, 13.54 tons and 13.01 tons respectively. The applicant company therefore contended that the respondent company or the Syarikat had overcharged them by 7.86, 8.05 and 7.52 tons in respect of the three deliveries transported by the lorry bearing registration number RA 3310 on 17 August 1985. All the entries in the 11 page record (Exhibit C-1) show like discrepancies between the permissible tonnage of the 6 lorries mentioned in the said record and the purported weights of the consignments of the granite aggregates delivered by those lorries at the diverse times and dates mentioned therein. The applicant company assessed the total amount of overpayment in the sum of RM28,639.05. Apart from the discrepancies shown in the Exhibit C-1, the deponent of Chin's affidavit also asserted at para. 15:

> The defendant's solicitors have yet to complete the search reports on the tonnage allowable for vehicle bearing registration numbers AAN 9286, AAP 5634, KL 1847, KL 6815 and RA 4143.

It is clear from the assertion that the applicant company is also alleging that the weights of the granite aggregates delivered by the lorries mentioned in the said para. 15 would in their opinion exceed the respective permissible tonnage of the said lorries.

On cursory scrutiny of the affidavit evidence as a whole, I am satisfied that none of the assertions made in Chin's affidavit including the contents of Exhibit C-1 have the applicant company satisfied the burden that is cast upon them to show that they have a good defence upon the merits or that they have disclosed such facts as may be deemed sufficient to entitle them to put up a defence. I say so for the following reasons. In the first place it is not disputed that the authorised agent or servant of the applicant company had unequivocally acknowledged receipt of every consignment of the granite aggregates by inscribing his signature and impressing the company's seal in the blank spaces reserved for such acknowledgment in the pertinent delivery order and delivery note. Similar acknowledgements were also made on some occasions on the weigh-bridge receipts. Such acknowledgements had been carried out since the delivery of the first consignment made on 14 May 1985 till the end of 1986. In the second place at the end of each month the respondent company had submitted a statement of account of the transactions of that month together with an invoice showing details of all deliveries carried out within that month. This procedure again had been adopted from May 1985 to December 1986. It was not until early 1987 that the applicant

raised a complaint for the first time about the shortfall in the weights of the granite aggregates delivered to them. Indeed they had all along expressly approved the accuracy of the volumes of granite aggregates delivered to them at the material times. In the third place it is also not in dispute that the weighing of each and every consignment of the granite aggregates for delivery to the work site was properly and correctly carried out by the Syarikat. The applicant company has not even alluded to any improper or malpractice on the part of the Syarikat in carrying out the loading and weighing of any of the consignments of granite aggregates for delivery to them. On the other hand the respondent company have so to speak laid all their cards on the table to show the manner in which they perform their obligations under the sale and purchase agreement and the applicant company has not deemed it fit to furnish even a scrap of material to show how and where the applicant company had failed to carry out their part of the bargain.

The materials relied upon the applicant company in contending that they have a defence on the merits are to my mind an after-thought. They have been acknowledging receipts of all the deliveries of the granite aggregates from the time they started the building project until they were about to complete the project and then on one fine day they suddenly turned round and said that the respondent company or the Syarikat had cheated them and that there was a shortfall in the volumes of granite aggregates that had been delivered to them. More importantly their allegation of the shortfall is not based on any definite facts which can reasonably be construed or inferred that the respondent company or the Syarikat had committed any fraudulent act in the loading or delivering of the granite aggregates. (See *Wallingford case* (*supra*)) The allegation of fraud made by the applicant company is but a general statement based on nothing more than a conjecture. To my mind the most proper and acceptable way to check the accuracy or otherwise of the weights of the consignments of granite aggregates delivered at the work site at this late stage is by using some written record showing the details of the deliveries and receipts maintained by someone at the material times when the deliveries were made and accepted. Here we have a complete set of documents which categorically show the weight of each consignment delivered to the work site and the acknowledgment of the receipt of the same by the applicant company or their authorised agent or servant. Even if the applicant company's allegation regarding the permissible tonnage of the six lorries is right, is that sufficient to establish that the weights of the granite aggregates as stated in the delivery and receipt record must be wrong? I do not think that anyone can say with any degree of certainty that no lorry owner would ever allow his lorry to transport goods in excess of the permissible tonnage prescribed under the carrier licence and permit? If that be so, there is no need for the Road Transport Department to employ enforcement officers to stop and check lorries to prevent them from being overloaded. At any rate nothing was said in Chin's affidavit as to the source from which the permissible tonnage of the 6 lorries were obtained. Under the circumstances the assertion regarding the permissible tonnage of the 6 lorries appearing in Exhibit C-1 is a worthless piece of evidence as it is based on hearsay. It is well settled that matter of hearsay contained in an affidavit is admissible if but only if the source and grounds of the information are disclosed (see *Re Young Manufacturing Co.* [1900] 2 Ch 953. Here we have the applicant company saying that they had written to the respondent company requesting for details of the permissible tonnage of their lorries used in the transportation of the granite aggregates but there was no response from the respondent company. It must necessarily follow that the said assertion in Chin's affidavit must have been obtained from some other source. But what is the source and how reliable is that source in supplying the information? In the circumstances I reiterate that the said assertion is inadmissible and I would ignore it.

For the above reasons, I am of the view that the applicant company has raised no triable issue which could amount to a defence to the action. The application to set aside the judgment in default is dismissed with costs.

Also found at [1988] 1 CLJ 357